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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1920.

No. 29, Original.

EX PARTE IN THE MATTER OF LINCOLN GAS & ELECTRIC LIGHT COMPANY, PETITIONER.

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1. **MOTION FOR LEAVE TO FILE PETITION FOR WRIT OF MANDAMUS.**
2. **PETITION FOR WRIT OF MANDAMUS.**
3. **SUGGESTION IN SUPPORT OF MOTION AND PETITION.**

ROBERT A. BROWN,
MAXWELL V. BEGHTOL,
Attorneys for Petitioner.

CHARLES A. FREUAUFF,
Of Counsel.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1920.

No. , Original.

EX PARTE IN THE MATTER OF LINCOLN GAS & ELECTRIC LIGHT COMPANY, A CORPORATION, PETITIONER.

MOTION FOR LEAVE TO FILE PETITION FOR WRIT OF MANDAMUS.

Comes now Lincoln Gas & Electric Light Company, a corporation, by its attorneys, and moves the court for leave to file a petition for writ of mandamus, directed to the Honorable Martin J. Wade, a district judge of the United States, sitting as judge of the District Court of the United States for the District of Nebraska, Lincoln Division, which petition is annexed hereto.

ROBERT A. BROWN,
Of St. Joseph, Mo.;
MAXWELL V. BEGHTOL,
Of Lincoln, Nebr.,
Attorneys for Petitioner.

CHARLES A. FREUAUFF,
New York City,
Of Counsel.

IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1920.

No. —.

Ex Parte In re LINCOLN GAS & ELECTRIC LIGHT COMPANY, *a Corporation, Petitioner.*

Original Application for a Writ of Mandamus Against the Honorable Martin J. Wade, Judge of the United States District Court for the District of Iowa, Southern Division, Sitting as a Judge of the District Court of the United States for the District of Nebraska, Lincoln Division.

To the Honorable Edward Douglass White, Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

1. Your petitioner, the Lincoln Gas and Electric Light Company, a corporation, respectfully represents that it is a corporation organized and existing under and by virtue of the laws of the State of Nebraska, engaged, among other things, in the business of manufacturing and distributing gas within the city of Lincoln, Nebraska; that the Honorable Martin J. Wade is a judge of the United States District Court for the District of Iowa, Southern Division, who at the times hereinafter complained of sat as a judge of the United States District Court for the District of Nebraska, Lincoln Division.

2. That on the 27th day of December, 1906, your petitioner instituted in the Circuit Court of the United States for

the District of Nebraska, Lincoln Division (which court has subsequently, by operation of law, become the District Court of the United States for the District of Nebraska, Lincoln Division), a certain action in equity entitled Lincoln Gas and Electric Light Company, a corporation, complainant, *vs.* The City of Lincoln, Francis W. Brown, mayor, and Edmund C. Strode, city attorney of said city of Lincoln, defendants, No. 159, Docket X, in which your petitioner sought to enjoin the said defendants from enforcing the penalties of an ordinance of said city of Lincoln, known as Ordinance No. 432, regulating the price to be charged for gas in said city; that your petitioner thereupon secured a restraining order, the material parts of which are as follows:

> "Now, therefore, it is ordered that you, the said city of Lincoln, Francis W. Brown, mayor, and Edmund C. Strode, city attorney of said city, defendants herein, your agents, servants, attorneys, and all persons acting by or under your authority or direction, be and you hereby are specially restrained and enjoined from in any wise obeying, observing, or conforming to the provisions, commands, injunctions, and prohibitions of a certain ordinance of the city of Lincoln, number 432, entitled: 'An ordinance regulating the price of manufactured gas, establishing penalties for the violation of the provisions of this ordinance and repealing all ordinances in conflict therewith,' passed November 19, 1906, by the council of said city, and approved November 19, 1906, by the mayor, defendant Francis W. Brown; and from ordering, instituting or causing to be instituted or prosecuted any action or proceeding, civil or criminal, against the complainant, its executive officers or manager for any act or thing done, suffered or omitted, which may be forbidden or commanded by the said

ordinance, and particularly from reducing its present rate of charges for gas to those prescribed in said ordinance, until the further order of this court."

That thereupon issues were joined and said cause tried and determined, by said court, adversely to your petitioner. That thereafter, in due course, said cause by appeal reached this honorable court, where, under an order dated February 19, 1912, and reported in 223 U. S., 349, said cause was reversed and remanded to said district court.

3. That subsequent to said reversal, such further proceedings were had therein as contemplated by the judgment and decision of this honorable court aforesaid, and said cause was finally submitted to the Honorable Page Morris, district judge of the United States District Court of the District of Minnesota, sitting as a judge of said District Court of Nebraska, Lincoln Division, who, thereupon on the 23d day of September, 1915, entered the decree of said court adjudicating said ordinance to be valid and binding upon your petitioner. That a copy of said decree is hereto attached, marked Exhibit "A," and made a part hereof as fully as if set out at length herein.

4. That thereupon due and lawful proceedings were had whereby said cause was, by appeal, brought before this honorable court for review. That said appeal was determined in this court in the October term, 1918, to wit, June 2, 1919, and is reported in 250 U. S., 256. That thereby the decree of the Honorable Page Morris, District Judge, was affirmed, except that said decree was ordered modified in two particulars, as follows:

"The final decree of September 23, 1915, will be modified by embodying in it a reiteration of that part of the final decree of April 6, 1909, which held that the ordinance of the city of Lincoln, approved December 10, 1906, levying an occupation tax against complainant, was illegal and void because violative of the constitution of the State of Nebraska, and that the enforcement of the same as to complainant should be perpetually enjoined.

"The decree of September 23, 1915, will be further modified so that the dismissal of the bill of complaint, in so far as it relates to the ordinance of the city of Lincoln approved November 19, 1906, establishing a rate of charges for gas in said city, shall be without prejudice to the commencement of a new action to restrain the enforcement of said ordinance hereafter, and

"Decree, as thus modified, affirmed with costs."

5. That subsequent to said opinion and decree of this court a mandate was issued out of this court and filed in the District Court of the United States, District of Nebraska, Lincoln Division, on the 24th day of December, 1919, in words and figures as follows:

"**Mandate.**

"To the Honorable Judge of the District Court of the U. S. for the District of Nebraska, Greeting:

"Whereas lately in the District Court of the U. S. for the District of Nebraska, before you or some of you, in a cause between the Lincoln Gas and Electric Light Company, complainant, and the City of Lincoln *et al.*, defendants, wherein the decree of the said district court entered in said cause on the 23d day of

September, A. D. 1915, is in the following words, viz:

"This cause came on to be heard on the 16th day of June, 1915, upon the report of Hon. John J. Sullivan, special master, filed herein on the 8th day of September, 1914, and the exceptions of the respective parties to said report and was argued by counsel, and taken under advisement by the court.

"And now, upon consideration thereof, it is ordered, adjudged, and decreed as follows, viz:

"That the report of said special master, be, and the same is, hereby confirmed;

"That the bill of complaint herein, so far as the same relates to the ordinance of the city of Lincoln, establishing a rate of charges for gas in said city, be, and the same is hereby, dismissed, and the restraining order heretofore granted against the enforcement of said ordinance is hereby dissolved;

"That the sum of thirty-five hundred dollars ($3,500.00) be, and the same is hereby, fixed and allowed as the compensation of said special master for his services and expenses, to be taxed as part of the costs of this action.

"That the plaintiff pay the costs of this action.

"By the court:

"PAGE MORRIS,
"*Judge.*

"And whereas, in the present term of October, in the year of our Lord one thousand nine hundred and eighteen, the said cause came on to be heard before the said Supreme Court, on the said transcript of record, and was argued by counsel.

"Consideration whereof, it is now here ordered, adjudged, and decreed by this court that the decree of the said district court in this cause be and the same is

hereby modified as indicated in the opinion of this court, and as so modified be, and the same is hereby, affirmed with costs; and that the said defendants, the City of Lincoln *et al.*, recover against the said complainant twenty dollars for their costs herein expended and have execution therefor.

June 2, 1919.

"You, therefore, are hereby commanded that such execution and proceedings be had in said cause as according to right and justice, and the laws of the United States, ought to be had, the said appeal notwithstanding.

"Witness the Honorable Edward D. White, Chief Justice of the United States, the twentieth day of December, in the year of our Lord one thousand nine hundred and nineteen.

"JAMES D. MAHER,
"Clerk of the Supreme Court
of the United States.

Cost of defendants:

Clerk	Paid.
Printing record	$.....
Attorney	20.00
	$20.00"

6. That the mandate in this cause is of that class which would and did not invest further discretion, jurisdiction, or power in said judge or said court to take any steps whatever, except to modify said decree of September 23, 1915, in the respects only as indicated in said mandate.

7. That thereupon the Honorable Martin J. Wade, district judge as aforesaid, duly assigned to the District Court

of the United States, District of Nebraska, Lincoln Division, entered, on the 6th day of January, 1920, an order of said court modifying the decree of September 23, 1915, as provided by said mandate as aforesaid. That a true copy of said order, marked Exhibit "B," is hereto attached and made a part hereof as fully as if set out verbatim.

8. That upon the filing of said order modifying the decree of September 23, 1915, the said District Court of the United States for the District of Nebraska, Lincoln Division, and the Honorable Martin J. Wade, judge thereof, having fully and completely complied with said mandate in all particulars and in due form of law, lost all jurisdiction over the parties to and the subject-matter of said cause, and that it was then the legal right of your petitioner to depart the court without further orders upon it, and without being compelled to litigate further in respect to said cause.

9. That, notwithstanding the legal rights of your petitioner as aforesaid, the said Honorable Martin J. Wade, without jurisdiction and for the benefit of persons not parties to said litigation, assumed to retain jurisdiction of said cause for the purpose of compelling an accounting between your petitioner and persons who had been consumers of gas in the city of Lincoln from 1906 to 1920, notwithstanding the fact that said cause as finally determined covered only the period of time ending September 23, 1915. To that end said Martin J. Wade, over the protests, objections, and exceptions of your petitioner, made and entered in said cause, without lawful jurisdiction, a certain order under date of January 6, 1920, requiring your petitioner to pay consumers amounts alleged to be due as overcharges covering a period not in-

volved in said litigation and further enjoining your petitioner from making settlements with consumers and said consumers from proceeding in any manner to collect said overcharges except in said court. That said order was in words and figures following, to wit:

"IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEBRASKA LINCOLN DIVISION.

No. 10 A, Equity Docket.

Lincoln Gas & Electric Light Company, *Plaintiff*,

vs.

The City of Lincoln *et al.*, *Defendants*.

Order and Decree.

"Now, to wit, on this sixth day of January, 1920, upon the entry of decree upon the mandate of the Supreme Court of the United States herein, the defendants present their motion for an order retaining jurisdiction in this court of this case for the purpose of making restitution of overcharges under the conditions of the bond filed herein. The plaintiff objects to such application, which objections are on file. The motion and objections thereto having been argued and submitted and the court being now fully advised, finds that the objections to said motion should be, and the same are, hereby overruled. The plaintiff excepts.

"And now, therefore, it is ordered and adjudged that under the general equity powers of the court

and under the expressed terms of the bond filed in this case, the court has jurisdiction to make all orders and decrees found to be necessary in making refund and restitution to consumers of gas for all amounts collected over and above the legal rate pending the litigation herein, to which ruling the plaintiff excepts.

"And thereupon the question is presented under said motion and the objections thereto, as to whether the consumers of gas are entitled to receive interest upon the amount of overcharges paid by them, and the court being now fully advised, finds and it is adjudged that the consumers of gas shall be paid by the plaintiff the overcharges, together with the legal rate of interest thereon from the time such overcharges were paid to the date of payment, to which the plaintiff excepts.

"And thereupon under said motion and objections, there is argued and presented the claim of the plaintiff that in making repayment and restitution, the plaintiff shall have the right to have determined what amount would in fact be legal, just, and non-confiscatory rate during the period when the overcharges were paid and that plaintiff shall have the right to have an accounting and adjustment and that the amount, if any, of overcharges to be repaid, shall be only the difference between the amount paid and the amount which the court might determine would be legal, just, and non-confiscatory rate.

"And now upon said question, the court being fully advised, finds that the plaintiff is not entitled to the relief asked, but that under the law and under the specific terms of the bond, the consumers are entitled to receive the difference between the ordinance rate and the amount actually paid without deduction, together with interest. To this ruling the plaintiff excepts.

"And now with reference to repayment and restitution it is ordered that this court alone shall have jurisdiction to determine all matters between the consumers and the Lincoln Gas and Electric Light Company, and it is now ordered and adjudged that all persons, their agents, employees, or assignees shall be, and they are hereby, restrained from proceeding in any other court except this court, to enforce or have adjusted the matter of overcharges or the repayment thereof. And it is further ordered that the plaintiff shall not pay the claim of any person claiming to be an assignee of any consumer until the same has been presented to this court and fully considered and approved.

"And now further with reference to restitution and repayment, it is ordered that the plaintiff shall proceed with all practical expedition to make repayment to all consumers as herein determined and in accordance with the findings of the court herein. At the end of sixty days the plaintiff shall file report as to progress in repayment.

"During said period of sixty days any person having any claim or controversy not settled or disposed of, by agreement of the parties, may file the same with the clerk of this court, and at the expiration of said sixty days, the court will determine whether or not it is necessary to appoint a master for the consideration of controverted questions.

"The court retains jurisdiction to make further orders herein at any time and the case is continued for such further orders.

"—— ——,

"Judge."

10. That thereupon your petitioner, feeling itself aggrieved thereby and protesting and objecting to the as-

sumption of jurisdiction over this petitioner by said honorable judge and court, duly appealed therefrom to this honorable court. That subsequent thereto, to wit, on the 7th day of June, 1920, on motion of the City of Lincoln, said appeal was dismissed for the reason that said order was not final (Lincoln Gas & Electric Light Company *vs.* City of Lincoln *et al.*, 253 U. S., 477). That thereupon, upon the filing of the mandate of this court dismissing said appeal, the Honorable Martin J. Wade, over the protests, objections, and exceptions of your petitioner, entered a further order in said cause, without the jurisdiction either of your petitioner or of the subject-matter of said action, in words and figures following:

"IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEBRASKA, LINCOLN DIVISION.

"No. 10 A.

"LINCOLN GAS & ELECTRIC LIGHT COMPANY, *Plaintiff.*

vs.

THE CITY OF LINCOLN *et al.*, *Defendants.*

"**Order.**

"And now on this 14th day of October, 1920, in the above case it is,

"Ordered and adjudged that Ralph P. Wilson be, and he is hereby, appointed special master herein, with full power to make investigation and determine

all matters in controversy and make a report to this court.

"He shall proceed forthwith to examine the books and accounts of the Gas and Electric Company and he shall, from such books and accounts, prepare a report upon each individual account of a consumer of gas who has paid any amount in excess of the ordinance rates during the pendency of any restraining order of injunction herein, showing the total amount paid, the amount due to the consumer for overcharges or charges in excess of the ordinance rate, as heretofore determined in this case, and interest upon such excess payments computed at the legal rate of seven per cent per annum.

"The individual cases will be included in a report to this court, but in order that the process of adjustment may be expedited, the master will file a report as soon as he has determined approximately one-fourth of the claims. Three additional reports will be filed, each including approximately one-fourth of the claims. This will simplify examination of the accounts. It is ordered that the master shall set forth the claims as nearly as practicable, in alphabetical order. As soon as the first report is filed, the court will make further orders as to notices and time for filing objections and for further proceedings.

"The four reports, aforesaid, will include the claims where nothing has been paid. An additional report will include the claims where payments, or partial payments, have been made, and in order that such report may be made, it is now,

"Ordered and adjudged, that all persons who have received payment or partial payment, and who still claim a balance on account of interest or for any other reason, shall file his claim with the master within sixty days from this date, such claim stating

the amount received, and the amount still claimed to be due. It will not be necessary to compute the amount of interest in filing a claim. It will be sufficient to specify in the claim the amount received by the consumer and make a general claim for interest thereon, and the computation may be hereafter made in case the court holds liability. The master will prepare a printed form for the use of claimants, who can fill in the amount paid and make a general claim for anything still claimed to be due, which the consumer can use in the filing of claims. It will not be essential that such printed forms be used, but it will simplify the procedure if such claims are uniform. The master will fix a time for hearing before him of these claims, and parties will be notified and evidence will be taken and the master will make his findings of facts, and of law, and report the same to this court.

"The testimony upon such hearings shall be taken in shorthand and preserved, but to save expense, it is ordered that the master shall not have transcript made or report the evidence taken in any individual case, except upon further order herein.

"The master will understand that in the preparation of report for claims, the computation shall be made for the different periods during which excess rates were paid, there being a portion of the period during which the court is advised the ordinance rates only were charged. Parties will understand that the only claims necessary to be filed with the master are those in cases where partial payment has been made by the Gas and Electric Light Company and where interest is now claimed upon the amount so paid or where it is claimed that the amount so paid was not correct for the period covered by such payment. It may be that in many cases a party will have a right to refund of excess charges for a period

not covered by any payment by the company. Such a claim will be reported by the master without having any claim filed before him. The same party may have a claim for interest upon partial payment for which a claim must be filed.

"Persons who have heretofore filed claims with the clerk of this court need not file another claim for the same matter in controversy with the master, it being hereby ordered that all claims filed with the clerk of this court shall be turned over to the master, who shall proceed with them as herein directed, with reference to claims filed direct with him by the claimant. The master shall have power to direct any claimant to make his claim more specific and as to all claims, shall have full jurisdiction to require issues to be made and to do all other things which will enable him to simplify the hearings as much as possible.

"It will not be necessary for the master to compute the interest upon these disputed claims where partial payment has been made until further order by the court. It will be sufficient in reporting his conclusions of fact and law to state that he holds that the company is not liable for interest, as he may find, leaving the computation for later order, in case it is held that there is liability therefor.

"The master may, at any time, ask for further directions in regard to the performance of his duties.

"In computing interest upon all claims, in order that the same may be uniform, computation shall be made upon the respective payments to October 1, 1920. Computations for interest from that date until the time of payment may be made at the time of such payment.

"There is a contention that repayment of overcharges is not required after a certain date in 1915,

Therefore, it may be necessary for the master to make separate computation of the claims accruing up to such date and claims accruing after such date. Such date shall be determined from the record and the claims of counsel filed herein, the purpose being to have the report of the master in such form that the questions raised as to liability after such date may be presented and determined by the court.

"The master is hereby authorized to employ accountants and other assistants; to employ a stenographer; to issue subpœnas for witnesses and for the production of witnesses and production of books and papers by fine or commitment with the same power as would the court if sitting in such hearing.

"The master will proceed with expedition, to the end that final disposition of this case may be made as soon as possible, employing as many accountants as can work to advantage in the preparation of the accounts for reporting, as aforesaid.

"Any money necessary to be advanced, shall be paid, half by each of the parties to this case, and the master will have the power to make and impose orders for such payment.

"Plaintiff excepts to the appointment of a master and to all other orders herein.

"_____,

"Judge."

11. That in the cause hereinbefore referred to said ordinance was adjudicated to be valid, but such adjudication covered only the period of time from the date of the passage of the ordinance to the 23d day of September, 1915, since no evidence was taken nor hearings of any character were had after said September 23, 1915, except proceedings for review of the decree of said date. That your petitioner has

never had a day in court, as to any period of time subsequent to September 23, 1915, and that under the rulings and assumption of jurisdiction of the Honorable Martin J. Wade, judge as aforesaid, an opportunity to be heard in court as to the validity of said ordinance from the 23d day of September, 1915, to January, 1920, is denied this petitioner. That from said date of September 23, 1915, to January 1, 1920, costs of materials entering into the distribution and manufacture of gas by reason of the World War and to economic disturbances, of which this court takes judicial notice, so advanced that during said period the operating expenses of your petitioner could not have been met by the revenue received from the sale of its gas at the price provided in said ordinance, to wit, one dollar per thousand cubic feet. That, irrespective of the question as to whether or not said judge and court might be held to have jurisdiction to adjudicate controversies concerning rebates from 1906 to 1915, in any event said court can have no jurisdiction in any regard over a period not included in the litigation now finally closed by the conclusion of proceedings for review thereof.

12. That your petitioner, upon the announcement of the decision of this court on the 2d day of June, 1919, affirming the decree of 1915, upholding the validity of said ordinance, desiring to end all controversy with its consumers, and notwithstanding the fact that your petitioner still claimed certain defenses, unnecessary to here enumerate, to the repayment to its consumers of overcharges as established by said decision of this court, settled with all consumers who would accept the overcharges from 1906 to September 23, 1915, and to that end issued its voucher checks to its various consumers

for the amounts due for said period as overcharges. That, as to settlements made, no controversy exists between said consumers and your petitioner, nor was there any necessity for the appointment of a master or the interposition of any court in connection therewith, your petitioner having been at all times ready, able, and willing to pay such claims up to said 23d day of September, 1915. That, notwithstanding said situation, the said Honorable Martin J. Wade, judge, and said court, without the complaint of any consumers, but on his own motion, enjoined your petitioner, as heretofore shown, from continuing to make such payments and from dealing with its consumers, as desired by the consumers and your petitioner, and as to assignees has enjoined and prohibited any settlement whatever.

13. That certain of said consumers, realizing and asserting that said Honorable Martin J. Wade, judge, and said court were wholly without jurisdiction in said matters, have commenced actions in the State courts of Nebraska to compel the payment by this petitioner of amounts alleged to be due as overcharge from 1906 to 1915, all of which your petitioner was proceeding to settle with consumers, but which, by virtue of the various orders of the Honorable Martin J. Wade, judge as aforesaid, this petitioner cannot pay nor settle without being in contempt of said court. That one of such causes has been determined adversely to your petitioner by the Honorable W. T. Stevens, a justice of the peace of the State of Nebraska, a copy of his decision being hereto attached, marked Exhibit "C," and made a part hereof as fully as if set out herein.

14. That the books of your petitioner, showing the accounts between your petitioner and its customers between

1906 and 1920, contain more than 25,000 accounts and are involved and complicated by accounts other than charges for gas consumed, so that the proceeding required by said order will occupy a period of time of approximately five years to complete, at an expense of $25,000.00. That your petitioner has no remedy in the matter, since its rights of appeal when the contemplated report of said master is filed would avail it nothing, but your petitioner will then have been required to expend large sums of money and long periods of time in advance of said appeal in a proceeding in which, as a matter of law, said court is wholly without jurisdiction. That by virtue of said order it is not required that any consumer make claim against your petitioner and establish his claim, but that thereby the burden of proof is cast upon your petitioner to disprove the general allegation that it is owing each and every one of its consumers large sums of money without any opportunity being given your petitioner to protest or defend against the payment of said claims and without the right to cross-examine or require the presence of its consumer in court, all of which is contrary to the usages and requirements of the laws of the State of Nebraska and the laws of the United States.

15. To summarize, the petitioner complains of the orders entered by the Honorable Martin J. Wade, hereinbefore fully referred to, for the following reasons:

(*a*) The said Martin J. Wade, as judge of said court, was without authority or jurisdiction to do anything more than make effective the provisions of the mandate of this Honorable Court, and under said mandate the court was wholly without jurisdiction to enter said orders or either of them.

(*b*) The said Martin J. Wade, as judge of said court, was without jurisdiction or authority to provide for the collection or payment of any overcharges alleged to be due consumers on account of gas furnished after September 23, 1915, the date of the decree of the district court.

(*c*) The said Martin J. Wade, as judge of said court, was without jurisdiction or authority to require the petitioner to settle with its consumers only upon the terms and conditions named in said orders and each of them.

(*d*) The said Martin J. Wade, as judge of said court, was without jurisdiction or authority to restrain the consumers of gas from prosecuting their respective claims for overcharges alleged to be due in any other court or jurisdiction.

(*e*) The said Martin J. Wade, as judge of said court, was without jurisdiction or authority to require a master appointed by him to determine the amounts alleged to be due each and every consumer of gas on account of overcharges, and to order the petitioner to pay such overcharges, even should such consumers fail to present and prosecute their claims for such alleged overcharges.

16. That your petitioner has no available nor adequate remedy in the premises, unless this court shall, in the exercise of its original jurisdiction, issue a rule to said Honorable Martin J. Wade to show cause why said orders so entered without jurisdiction and after final determination of said litigation by the mandate of this court, shall not be ordered revoked and nullified by the writ of mandamus of this honorable court.

Wherefore your petitioner prays that a writ of mandamus in due form be at once issued from this court, returnable according to the practice and usage of the court, commanding and requiring the Honorable Martin J. Wade, judge as aforesaid, to cause said orders so entered to be nullified and revoked and to refrain from assuming jurisdiction over your petitioner in said cause as aforesaid, or on failure thereof to show cause to this court within the said time why the same has not been done.

ROBERT A. BROWN.
Of St. Joseph, Mo.;
MAXWELL BEGHTOL,
Of Lincoln, Nebr.,
Attorneys for Petitioner.

CHARLES A. FRUEAUFF,
Of New York City,
Of Counsel.

CITY OF WASHINGTON,
District of Columbia, ss:

I, Max. V. Beghtol, being first duly sworn, on oath depose and say that I am one of the attorneys of record for Lincoln Gas & Electric Light Company, the petitioner named in the foregoing petition, and that the matters and things set forth therein are true to the best of my knowledge, information, and belief. MAX. V. BEGHTOL.

Subscribed and sworn to before me this 20th day of January, A. D. 1921.

[Seal of Wm. R. Stansbury, Notary Public, District of Columbia.]

WM. R. STANSBURY,
Notary Public, D. C.

EXHIBIT "A."

Decree.

This cause came on to be heard on the 16th day of June, 1915, upon the report of Honorable John J. Sullivan, Special Master, filed herein on the 8th day of September, 1914, and the exceptions of the respective parties to said report and was argued by counsel, and taken under advisement by the court.

And now, upon consideration thereof, it is ordered, adjudged, and decreed as follows, viz:

That the report of said special master be, and the same is, hereby confirmed;

That the bill of complaint herein, so far as the same relates to the ordinance of the city of Lincoln establishing a rate of charges for gas in said city be, and the same is, hereby dismissed, and the restraining order heretofore granted against the enforcement of said ordinance is hereby dissolved;

That the sum of thirty-five hundred dollars ($3,500.00) be, and the same is hereby, fixed and allowed as the compensation of said special master for his services and expenses, to be taxed as part of the costs of this action.

That the plaintiff pay the costs of this action.

By the court.

PAGE MORRIS,
Judge.

EXHIBIT "B."

"IN THE DISTRICT COURT OF THE UNITED STATES, LINCOLN DIVISION.

10 A.

THE LINCOLN GAS AND ELECTRIC LIGHT COMPANY, *Plaintiff*,

vs.

CITY OF LINCOLN *et al.*, *Defendants*.

Order.

Filed January 6, 1920.

"This cause came on for hearing upon the motion for judgment on the mandate of the Supreme Court of the United States herein, dated December 20, 1919, and filed in this court December 24, 1919; upon due consideration whereof it is ordered, adjudged, and decreed:

"1. That the decree of September 23, 1915, be, and the same hereby is, modified by adding thereto the following:

"The court further finds that the ordinance of the city of Lincoln, approved December 10, 1905, levying an occupation tax against the complainant, violates the constitution of the State of Nebraska, and is for that reason illegal and void and that the enforcement of the same as to complainant should be and is hereby perpetually enjoined.

"2. That the decree of September 23, 1915, be further modified by adding after the words 'is hereby dissolved' the following 'without prejudice to the commencement of a new action to restrain the enforcement of said ordinance as provided in the opinion of the Supreme Court of the United States herein.'

"MARTIN J. WADE."

January 6, 1920.

EXHIBIT "C."

Memoranda.

In my view of the present case, it presents four propositions to be determined:

First. The language employed by Judge Wade, of the District Court of the United States, in his decree of January 10, 1920, would seem to reserve exclusive jurisdiction in that court and to restrain consumers of gas from maintaining separate suits in any other court. This language I think, however, was intended as sound admonition and advice rather than as a peremptory order against individual consumers who had never been served with process in that suit, were not parties thereto, and had in no manner participated therein. The plaintiff, having brought the action in regular form in this court, I believe has a right to an adjudication of his personal claim and this court could not, without error, refuse to entertain the action.

Second. It is urged by defendant that before the circuit court decree of January 10, 1920, was entered a check for the amount of plaintiff's claim (without interest) was issued by defendant, payable to plaintiff and delivered to plaintiff's agent. That this check contained words which if accepted by plaintiff amounted to a complete accord and satisfaction of plaintiff's claim, principal and interest. That plaintiff accepted the check, retained it for about six months, and then presented it for payment, with the accord and satisfaction marked out or mutilated with pen and ink. Under instruction of defendant, payment of the check was refused because it was mutilated and because the endorsement was by agent and not by the plaintiff in person. Defendant contends that the acceptance and retention of the check for so long a time amounted to an acceptance of the accord and satisfaction and fully settled plaintiff's claim. I think

otherwise, however, so long as no money was ever paid upon the check.

Third. More than four years elapsed since the last item of plaintiff's claim accrued and before this action was commenced. Plaintiff's action is therefore barred by the statute of limitations unless something has occurred to toll the statute. The issuance of the check, if it amounted to an acknowledgment of the debt in writing, would have that effect. A check alone is sure, and delivered, as in this case, with accord and satisfaction written into it, may well be considered as an offer of compromise and settlement, and in my judgment would not be sufficient to take the plaintiff's claim out of the statutes of limitations.

Fourth. There remains one more important consideration upon this question of limitations. For several years both before and after the claim of plaintiff had accrued, defendant had instituted and maintained an action in the circuit court of the United States against the city of Lincoln, its mayor and its city attorney. Defendant had caused an injunction to issue restraining the city and its officers, agents, and servants from taking any steps toward enforcing the "dollar gas ordinance," alleging the same to be confiscatory, and praying that it be decreed void. Plaintiff was not a party to that suit, but his claim directly depended upon the event of that suit, and therein the present defendant had executed a bond conditioned for the repayment to consumers of the excess charges in case the ordinance should be held valid. That suit was being actively contested, and manifestly for plaintiff, as an individual gas consumer, to have brought a separate action would have been a vain and nugatory proceeding. The question as to whether the "dollar gas ordinance" was confiscatory was intricate and complicated. It could be arrived at only by long and expensive litigation. It was in the hands of a high court. Until that question was determined by that court, certainly no other court would have attempted a separate injury at the suit of a small consumer.

Comity between courts and the natural orderly course of procedure would have forbidden such legal folly. Until the injunction was dissolved and the validity of the ordinance established, plaintiff was effectually precluded and prevented from instituting or maintaining his suit. This condition existed solely by and through the suit brought and prosecuted by the defendant in its attempt to annul the ordinance.

From the foregoing facts, I arrive at the conclusion which, while it is based upon only a few decisions, seems to me to be sound in principle as applied to the present case. I believe that the statute of limitations was tolled during the litigation in the circuit court, and that under the doctrine of equitable estoppel the defendant is precluded from pleading the statute of limitations as against plaintiff's claim. The judgment of the court will be for the plaintiff for the amount of his claim, interest thereon to date, and costs, including a reasonable attorney's fee.

W. T. STEVENS,
Justice of the Peace.

SUGGESTIONS AND AUTHORITIES IN SUPPORT OF MOTION AND PETITION.

1. Under the mandate of this court the district court was without jurisdiction to do more than strictly follow the terms of the mandate. That the district court did exceed its jurisdiction, and that mandamus is the proper remedy, is shown by the following authorities:

Gaines *vs.* Rugg, 148 U. S., 228.
In re Wynn, 213 U. S., 458.
McClelland *vs.* Casland, 217 U. S., 268.
Perkins *vs.* Fourniquet, 14 Howard, 313.
Ex parte Washington & G. R. Co., 140 U. S., 95.
In re Sanford Fork & Tool Co., 160 U. S., 247.
Green *vs.* C., S. & C. R. Co., 49 Fed., 109.
In re Glenochil, 128 Fed., 963.
Boyce *vs.* Grundy, 9 Peters, 275.
Harrison *vs.* Clark, 182 Fed., 765.
Hagerman *vs.* Morran, 75 Fed., 97.

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